Public Consultation; the LSRA is seeking views on [Legal] Partnership

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Submission of Kieran Fitzpatrick, Anbally, Galway. 23 March 2017

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By email to public118@lsra.ie Deadline = 24 March 2017.

In this Public Consultation, I understand that the LSRA is seeking views on [Legal] Partnerships between (1) Barristers and Other Barristers, (2) Barristers and Solicitors. (As I understand it, this does not relate to partnerships between solicitors, which already exist).

The purpose of Public Consultations:

The general idea is that decision makers are better informed and can better make decisions that optimally further the general public interest. However, I would argue that this is a somewhat staid view of public consultations. They should be viewed as an extension of democracy, to help ensure that laws represent the will of the people. Thus, the manner in which they are conducted should respect the gravity of what is at stake, and they should demonstrably seek to adhere to best practice principles in the conduct of public consultations.

In this regard, I have to submit that it is regrettable that this consultation states that the LSRA only "may" publish the outcomes. I, for one, am less likely to take part, or if I do, I'm not going to go to as great an effort, if I'm not assured that my submission will be published.

Non-publication reduces confidence in persons' belief that a submission will be taken in to account.

But secondly, the purpose of Public Consultations is also about allowing other persons to get engaged with alternative viewpoints, to facilitate a dynamic public discussion and to provide opportunity for persons to rebut arguments advanced by others. Hence, the best practice is public consultations is to allow a two-stage engagement, such that persons can respond to the first "take".

For example, the first stage could involve the "conductor" summarising the main arguments for and against a particular proposal, while also allowing the public to oversee this process, by allowing access to all of the original submissions. The public should then be given a shorter period to respond to the first assessment (Second round submissions could be limited in length, to avoid excessive administrative burdens, and to encourage most points to be submitted, first time around.)

A further point in relation to public consultations, is that the public is better facilitated to partake, if relevant information in the form of facts/statistics and a set of typical arguments are presented in advance of the consultation, so that those persons who are not familiar with the debate are better empowered.

With regard to the above, it is unfortunate that very little information has been provided, and that no commitment has been made to publish or to provide opportunity for rebuttal. The timeframe, while unclear (website does not indicate date of publication) appears to be somewhat short relative to the complexity of what is at issue.

A constitutional process

Public Consultation is part of a "constitutional" process of law reform, a process that sits at the heart of a democratic state. Of course, there does not currently exist any mandatory requirement to conduct public consultations, at all. However, this is an "evolving norm" in democratic systems internationally, and is, in fact, compulsory under the South African constitution[1]:

> Section 59 – Public access to and involvement in the [SA] National Assembly. (1) The National Assembly must: (a) facilitate public involvement in the legislative and other processes of the Assembly and its committees; and (b) conduct its business in an open manner, and holds its sittings, and those of its committees, in public, but reasonable measures may be taken to (i) regulate public access, including access of the media to the Assembly and its committees.

And the SA courts have upheld this requirement- Judge Sachs in *Doctors for Life International v Speaker of the National Assembly and Others,* said: "All parties interested in legislation should feel that they have been given a real opportunity to have their say, that they are taken seriously as citizens and that their views matter and will receive due consideration at the moments when they could possibly influence decisions in a meaningful fashion."

It is a general principle of law that, when a government provides certain benefits, even if by concession, to its citizens, that such a process must adhere to constitutional justice. For example, though a state may not be required to provide certain social welfare benefits, but when it chooses to do so, it must do so in a non-discriminatory manner. This principle has been upheld by the ECHR and Irish courts alike.

In *McKenna v An Taoiseach* (No.2) SC (1995), the SC said that unequal expenditure on one viewpoint over another in relation the changing of the constitution, 'as well as representing a breach of the **constitutional right to equality** also represented an infringement of the **constitutional right to freedom of expression** and the constitutional right to **a democratic process** in referenda'.

Law regulating access to the courts in particular, represents a key aspect of the constitutional order, even if not part of the constitution *per se*. In this regard, principles of constitutional justice need to be followed, though, this should equally apply to all law reform or policy decisions.

The constitution makes clear that the Dáil needs to be open to the public and transparent in its activities. I would argue that this transparency requirement should extend to delegated authorities when engaging in law-making processes, particularly those affecting the legal system generally. I would argue that there is a constitutional imperative to conduct all law reform procedures as transparently as reasonable possible, and that this requires that all submissions be proactively published and not just made accessible via Freedom of Information. Many more persons are willing to engage with information which is freely available than those who will go to the effort and time of seeking the same information via FOI laws. The UK Supreme Court, for example, held that a public consultation had been unlawful, where it failed to adhere to fair procedures.[2]

[1]Public Participation Framework for the South African Legislative Sector
http://www.sals.gov.za/docs/pubs/ppf.pdf

[2] *R (on the application of Moseley) v Haringey LBC* [2014] UKSC 56

Code of Practice:

I submit that the government needs to develop a model system for conducting public consultations and such a model needs to adhere to general principles of fairness, and assure participants that their efforts will be afforded equal respect. The UNECE and other entities have produced booklets in relation what is best practice in relation to public consultations.

The European Anti-Poverty Network (EAPN) Ireland produced a report in 2011 on effective public consultation.[3] The report refers to an OECD report which cautions that "governments should not underestimate the risks associated with poorly designed and inadequate measures for information, consultation and active participation. They may seek to inform, consult and encourage active participation by citizens in order to enhance the quality, credibility and legitimacy of their policy decision, only to produce the opposite effect if citizens discover that their efforts to be informed, provide feedback and actively participate are ignored or have no impact at all on the decisions reached".[4]

The EAPN report refers to another report produced by International Association for Public Participation[5] which sets out a number of criteria for effective public consultation: These criteria include - (1). Seeking out those affected by or interested in a decision. (2). Seeking input from participants in designing how they participate. (3). Providing participants with the information they need to participate in a meaningful way. And (4). Communicating to participants how their input affected the decision.

One of the best examples of a public consultation conducted is the one which was done by the Department of Environment and Local Government related to the Aarhus Convention in preparation of Ireland's National Implementation Report 2014.[6] In this consultation, a "double –take" was undertaken, where the original participants were invited to re-submit responses (Phase 2) to the departments summary of the initial responses received (Phase 1). The respondents were thus facilitated to criticise the initial interpretation of the consultation, with a view to revising its conclusions.[7] All responses were published on the department's website, permitting robust public scrutiny.

I hope the Authority can take these suggestions into account in doing the upcoming consultation on the issue of direct access to barristers.

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[3] Chris McInerney, *Building Effective Consultation and Participation*, (Dublin, 2011).
[4] OECD, 2001: 21 .
[5] IAP2 is ,an international association of members who seek to promote and improve the practice of public participation in relation to individuals, governments, institutions and other entities that affect the public interest in nations throughout the world" see http://www.iap2.org/
[6] Public Consultation on the implementation of the UNECE Aarhus Convention in Ireland < http://www.environ.ie/en/Environment/AarhusConvention/NationalImplementationReport/ > accessed 9 January 2015.
[7] (I'm not suggesting that any "second-take" should be restricted to "first responders", only).

Legal Partnerships:

Introduction –

The debate in relation to partnerships stems from a general awareness that legal costs, particularly in relation to litigation, in Ireland are prohibitively expensive. The Troika, or more particularly the EU Commission, brought some pressure on Ireland to implement reforms, some of which had been recommended years earlier by the then Competition Authority.

The EU Commission issued a report in 2015, effectively admitting that they had failed to effect reforms in Ireland, and admitting that it should have front-loaded the reforms it had sought. In other words, the next time the country gets bailed out, it will be more efficient in demanding reforms, BEFORE handing over all the bail-out cash.

However, the emphasis of the Commission's reforms was in part misguided and based on a partial overview of the entrenched problems with the legal system, possibly due, in part, from a lack of familiarity with the unique features of the historical British based legal system, with its intricate defences that have parried off reforms for centuries.

The Commission also perhaps put too much emphasis on the 2006 Competition Authority [CA} report, which pointedly took the issue of the English rule (or loser pays rule) off the table at the outset [see the first few pages of the report], despite the chairman of the 1990 Fair Trade Commission highlighting the distortional effects that this rule causes to market forces.

The reform of the English rule, by capping in some fashion the level of recoverable costs, must lie at the centre of any genuine efforts to remedy a prohibitively expensive legal costs system; Americans realised this as far back as 1853, when it introduced the 1853 Fee Bill which transformed the US legal system from an accessibility perspective, and which gave birth to what later be referred to as the American rule. Most of the countries in the world which are serious about access to justice, have implemented costs-caps of some form – and the UK has just implemented a fixed-costs system in relation to a range of legal actions.[8] Canada made some similar progress in 2007.

Hence any analysis [as advanced by the Commission] that seeks to overlay normal economic theory to a legal system, which clearly cannot [currently] and does not adhere to such a normal supply-demand/cost minimisation approach, is bound to be flawed.

The main flaw with the Commission's approach was the supposition that legal costs in Ireland is substantially a cost-driven issue, rather than a market distortion issue. I contend that the high costs of litigation results from the fact that the assessment of legal costs, largely removes a market based assessment of those costs, and most particularly removes the main anchors that would, in more normal markets, have a calming effect on an inflationary market: Advertising has been restricted, and even with reforms, there is little price-advertising. Secondly, lawyers can seek extortionate levels of fees from adversaries [party v party] and their own clients at legal costs adjudications, and remain (generally) insulated from the PR effects of such extortionate efforts. Open justice, is hampered for lawyers' fees, as (1) there is no access to documents, which is essential to understand any adjudication. (2) most outcomes are not published; proposed reforms on this issue have yet to be commenced. (3) The unfair rules that apply to adjudicative process forces clients to settle, and these settlements are not in the public domain. This subterranean settlement arena is not subject to

[8] See new CPR rules Part 45. (Feb 2017).

public oversight, and current short-sighted understandings of open justice, as a key constitutional and democratic process, ignore the consequences of the information deficit which this creates.

In most instances of service provision, the satisfaction of consumers is a priority for service providers. Hotels, for example must provide the service as agreed or face a negative review. Hence, the contract, is anchored not just by the threat of court action, but by the threat of future consumers becoming aware of how the consumer was treated. This has a huge influence and helps to self-regulate the market at a very low cost, with very seldom resort to the courts. The price of the service is anchored to real market rates, in a competitive environment, and the regulation of the agreed contract is relatively and cheaply regulated by open justice principles. The UK SRA says, 'One option we explore in this section is to create the opportunity for individuals and firms to publish information on price and quality through our online register and therefore make this information easily accessible to consumers and comparison sites.'.[9]

Why is this important in relation to partnerships and advantages/disadvantages?

Partnerships are seen to be progressive, as they allow business persons (in this case, lawyers) to pool some resources, such as office space, heating expenses, secretarial services or other costs.

However, the Irish legal system is so dysfunctional, and inaccessible for the majority of potential consumers, that I have to suggest that dealing with the issue of partnerships, as this stage, is untimely, at best. At worst, it will take a long time to get to grips with, and eat up a lot of the Authority's time, when much more significant and substantial issues need to be dealt with first.

The dysfunctionality of the Irish legal system needs a full-time, rather than an Authority that just sits once a month, to deal with the task ahead. Getting bogged down on an issue that is peripheral to reforms which are urgently needed, will drag out the reform process for years on end. During the "passage" of the LSRA 2015, over its four or so years, a delay of at least one year ensued, as the various parties in government could not agree on how to deal with the apparently sensitive issue of partnerships and MDPs. It seems inevitable that further "pillow fights" will follow over this issue, which will hold up much more needed reforms. Bad hotels will be automatically "sanitised" from the system by a series of disgruntled customers. However, the reluctance of government to subject lawyers to open justice principles, facilitates some lawyers to be repeat overcharges or poor service providers without public awareness of earlier findings. Hence, the public pay for a more expensive regulatory regime, that appears primarily dedicated to furthering the reputation of the professions, rather than the interests of justice.

But with lawyers - First, price advertising is frowned upon, even if now less restricted. The UK CMA, in its interim findings, published on 8 July 2016, 'states that a lack of transparent information is making it harder for consumers to compare providers, undermining competition and reducing the incentives for providers to compete on price, quality and innovation. It says that this lack of information also contributes to consumers not seeking legal advice when they have a legal need. In considering remedies, the CMA has specifically sought views on whether it should recommend to

[9] https://www.sra.org.uk/sra/consultations/discussion-papers/regulatory-data-consumer-choice-legal-services.page

regulators that they introduce a mandatory requirement to publish specific price or service information.'[10]

Second, an open-justice self-regulating environment is largely frustrated; this then apparently requires 4-levels of separate adjudicative tribunals, with NO ACCESS to the normal contract dispute court, which is available to hotel customers.

The Problem:

Partnerships and MDPs can reduce costs, a little bit, like perhaps between 1% and 5%, but under the current dysfunctional system, where market forces play such a muted role in the determination of legal costs, these costs will not be passed on to consumers.

Dealing with partnerships before dealing with other more glaring problems, is kind of akin to putting the cart before the horse. As has been recognised, by the UK SRA, in its report, any costs savings will accrue to larger corporate firms, rather than consumers, or small businesses. However, in this regard, it is much more important to allow in-house barristers, to help reduce costs, than partnerships or MDPs.

Apart for the time delay to a part-time Authority, which will result in attempting to introduce a regulatory structure for Partnerships, there will be further costs resulting from, both the drafting of these regulations and their monitoring.

Costs of Regulation:

We now [or will soon] have four separate bodies that regulate legal-costs disputes. All this in a small country. I have highlighted the problems with these systems in my submission to the Aarhus Convention Compliance Committee.[11]

All of these systems are ultimately paid for by consumers. Lawyers have to pay substantial registration fees to their respective representative bodies. In addition, lawyers have to pay for Professional Indemnity Insurance and soon will have to pay MORE FEES to the LSRA.

I have to submit that there is duplication of regulation here and that this imposes unnecessary costs on the public. The SRA points out in its report, as I understand the CA said in its report, a conflict of interest can arise when representative bodies also engage in a regulatory role.[12]

Professional Indemnity Insurance [PIS] is presented as a protection for consumers, when, in reality, it is a protection for lawyers, (or well off lawyers, primarily), and provides protection for the public in only the most unusual circumstances. The main problems faced by consumers, when a lawyer acts negligently, is (a) finding a local solicitor who will represent them (the Law Society have a list of 100, or so, but this may necessitate travelling a huge distance to consult), and (b) risking the adverse legal costs that will befall them, if they lose a case. We should have transparency as to how PIS is spent by

[10] https://www.sra.org.uk/sra/consultations/discussion-papers/regulatory-data-consumer-choice-legal-services.page
[11] See C113
[12] See also, the decision of the CJEU on the case of Wilson v Lux bar.

insurance companies, however, I suspect that most of it goes towards equipping lawyers with a team of lawyers to defend the actions, rather paying out to consumers.

Hence, PIS, is paid by consumers, as lawyers pass it on, in the form of fees, but probably primarily benefits lawyers. It allows the lawyer-defendants to threaten potential challengers, with huge legal bills, in situations where persons are unsure of obtaining legal representation, and where the state prevents relatives from representing litigants, in situations where local lawyers may seek to avoid offering their services. I point this out to show, how regulations can inflate costs, to purportedly create a public benefit, but which, largely contributes to the establishment costs of lawyers, and thus undermines competition. Thus, the public pays on the double, firstly for the PIS, and secondly for the additional costs that results from the lessor competition that follows from the wipe-out of those lawyers that cannot afford the fixed-establishment costs (PIS, LSRA fees and Legal Body fees).

The government's so-called concerns for consumers, would be better exemplified, if it established an insurance model which provided legal costs insurance for clients on a similar footing to that provided to lawyers, and/or made PIS optional for lawyers (or consumers), and its existence [or non-existence] notifiable to consumers.

Establishment costs (or fixed) costs may be further increased by an overly complicated regulatory regime in relation to Partnerships, which would be counter-productive to consumer interests.

Apparently, as low as 25% of qualified barristers go on to become successful barristers. Many struggle to survive for several years, paying out huge fixed costs to keep the chance alive of earning a living. This dropout statistic, coupled with slave-like [working for "minus" money] early years of part-time lawyering that most barristers have to endure, scares the living daylights out of most aspiring law-students, who aspire to become lawyers, leaving many to change careers, when they see how daunting the task is. Those who succeed are then reluctant to pave an easy-path for their successors, feeling that their own years of misery, justifies their right to maintain the top-heavy system, which facilitates high fees for the survivors, fees which would be undermined, if the establishment costs were reduced. Hence, the treadmill, is incentivised to continue.

The UK SRA[13] said in August 2016[14] –

> '…We also agree that there is a need to ensure regulation is proportionate and risk based and that regulators should be independent from those they regulate. We would go further and argue that independence would be a key driver for proportionate and risk based regulation, as regulation would then be free from any protectionist influences.'
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> 'We agree with your finding that this market is not functioning as effectively as it could. We also agree with your observation in relation to the regulatory framework that "...a key principle should be to ensure full independence of the regulator from the providers it regulates." It is only being free from representative influence that will allow the regulation of legal services to become fully proportionate and risk based. We strongly encourage the CMA to propose a specific remedy in its final report that tasks Government with bringing forward legislation to finally secure the independence of regulation from the professional bodies, as well as the legal profession and Government.'

The above advice needs to followed in Ireland as well.

[13] Solicitor Regulatory Authority [UK].

[14] http://www.sra.org.uk/sra/consultations/consultation-responses/cma-interim-report.page

Specific Issues regarding Regulation of Partnerships:

Only regulate where it is absolutely necessary. Why not allow partnerships to proceed, and allow the market to self-regulate, subject to current regulatory rules?

What evil is to be stopped? Government should not engage with a market, unless some identifiable wrongdoing needs to be curtailed--- It should not be speculating to wrongdoing.

Steven Heyman argues that social contract theory emanates from the view that, 'society is formed to obtain the advantages of association with others,' and that, 'In a state of nature, an individual has a right to be free from interference by others.'[15] State interference with persons right to freely associate, therefore, needs to be justified on compelling grounds.[16] These grounds do not apply to partnerships; if partnerships fail to improve service to consumers, then the market will self-regulate, and informed consumers will revert to using lawyers who are not engaged in partnerships.

If hairdressers can operate in groups of three of four, instead of as lone operators, then why can't lawyers? I submit, that it is important to provide maximum flexibility to lawyers, to try and make legal services affordable in Ireland. When 95% of the population cannot afford to engage in litigation, then the system is dysfunctional; this dysfunctionality is, in my view caused by excessive regulation.

WE NEED LESS REGULATION OF Lawyers, and MORE transparency in all disciplinary and costs dispute systems.

[15] Steven J. Heyman, 'The First Duty of Government: Protection, Liberty and The Fourteenth Amendment', 41 Duke Law Journal 507. < http://scholarship.law.duke.edu/dlj/vol41/iss3/2/ >.

[16] It is implicit in social contract theory, that when the citizen surrenders certain freedoms in return for the protection of the state, he/she only surrenders such freedoms for proven benefits. The state, in requiring citizens to obey laws, agrees to protect citizens' fundamental rights, and to not interfere in such rights, other than for compelling reasons, Edward Coke said that these, 'reciprocal obligations were inherent in the very nature of the relationship between king and subject', summed up by the maxim, '*protectio trahit subjectionem, et subjectio protectionem*": protection implies subjection, and subjection protection. [See: Heyman, (p513)].

Scope of the Consultation

The Authority seeks submissions in respect of the regulation, monitoring and operation of legal partnerships, to include the following issues:

1. The **benefits and risks** for consumers of legal services ("services") that can be reasonably expected from enabling them to access legal partnerships.

Benefits: Part-time lawyers could pool resources and more easily provide services to the public. This would facilitate parents to engage in child-rearing [which often disproportionately involves women], and also continue in legal practice. All legal fixed establishment costs need to be regulated, so that part-time lawyers only pay proportionate to their level of work, or which at least reflects their part-time status.

Barristers are allowed to form chambers in England, and there are no problems that the public should be concerned about in relation to chamber arrangements. They are clearly formed, as they provide economic benefits to the members, so why should they be blocked in Ireland?

Barristers need to have premises where they consult with the public. The current system, where consultations apparently take place in corridors of court-houses is dysfunctional.

The risk, is that unnecessary regulations will impose additional costs on an already over heavy regulatory structure, and unwind any cost benefits to all but the big corporate interests. Robert Peroni John and Dzienkowski writing on the issue of MDPs (of which partnerships are a subset) said:

> 'Unneeded and overbroad regulation, often motivated by economic protectionism, should be discarded. The state bar authorities should design their regulation of MDPs in the manner this Article suggests and thereby protect the public interest without unnecessarily interfering with the operation of market forces in the professional services arena.'[17]

2. The measures that need to be included in any regulations adopted by the Authority in order to provide adequate protections to consumers procuring services from legal partnerships.

We need a transparent, and fair costs dispute system, which does not allow costs to be assessed, on the basis of any rules other than pre-agreed contracts, and which applies the indemnity principle to party/party costs. Lawyers who fail to form written contracts for fees with their clients should be precluded from seeking payment afterwards. The rule which prevents lawyers from charging on the basis of a percentage of awards [or other values] should be abolished; this undermines competition, and it undermines the ability to cap costs, where there is some uncertainty as to outcomes.

[17] Robert Peroni and John Dzienkowski, 'Multidisciplinary Practice and the American Legal Profession: A Market Approach to Regulating the Delivery of Legal Services in the Twenty-First Century' (Fordham Law Review, October 2000) <http://ssrn.com/abstract=2277718> , accessed 23 March 2017.

3. The information that legal partnerships are required to provide to clients, given the obligations that arise from the codes of practice and professional codes that will apply to practising solicitors and practising barristers (e.g. on compensation fund coverage or professional indemnity cover or provision of information regarding the basis of professional fees).

Lawyers, generally should be required to advise clients of the current unfair system of legal costs rules, such as the one sixth rule, or the proposed 15% rule, which apply to costs disputes. Lawyers who fail to do so, (which is arguably required to be done, on foot of the EU unfair Commercial Practices Directive[18] (re misleading omissions)) should be precluded from obtaining higher than €1000, in fees, in any subsequent dispute.

4. The manner in which the Authority deals with complaints from clients or other parties in relation to allegations of inadequate services, excessive costs and professional misconduct on the part of practising solicitors or barristers who work in legal partnerships.

Justice should be administered in public. The Authority should not engage in dispute issues, unless there is an alternative constitutionally compliant legal costs dispute system, firstly in place.

An alternative system of justice needs to be an alternative, which is FREELY chosen.

5. The relationship between complaints about legal partnerships and complaints about the individual legal practitioners who work in those partnerships.

Make one lawyer responsible for contract disputes, particularly costs disputes. That lead lawyer needs to be responsible for quality of service, unless he/she can attest that particular work was done primarily by another lawyer, with the consent of the client. In such a case, the second, or third lawyer should be accountable for poor performance. But lead lawyer should be responsible for costs. Dispersed responsibility usually equals no responsibility; please avoid.

6. The form in which the Authority shall publish the register of legal partnerships under section 117 of the Act, and in particular, the information that the public register should include.

I don't see any benefit from such unnecessary regulation. When, currently solicitors act in tandem with barristers, what registration requirements are there? And, if there are none, then why does that need to change? Sharing a building does not change matters significantly.

[18] This is transposed by the 2007 Consumer Act. Note: that the Directive allows professional codes of conduct to subjugate the Directive, BUT, [apparently] only if such Codes are public law, imposed by the state;
See Article 3(8): 'which Member States may, in conformity with Community law, impose on professionals. '.. Whether such a provision of EU secondary law is compliant with EU Treaty obligations to protect consumers (equally), is another matter.
See - EU Directive: http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32005L0029

7. The registration requirements for legal partnerships that may arise from sections 104, 105 and 116 of the Act.

No Comment, other than above.

8. The consequences for legal partnerships and practitioners of a breach of the Act and/or any regulations made under the Act.

As per no 5 above.

9. The events in respect of which the Authority should require notification from legal partnerships after registration apart from cessation of practice (e.g. should legal partnerships be required to provide periodic declarations to the Authority and if so, what information should be required in such declarations?).

No need.

10. The relationship between on the one hand, the roll of solicitors and the roll of practising barristers and, on the other hand, the register of legal partnerships.

No need for roll of partnerships. We need proper access to unfair terms of contracts/unfair commercial practices legislation for consumer's interaction with lawyers.

11. The manner in which the establishment of the register of legal partnerships is funded, and also the manner in which the ongoing regulation, monitoring and operation of legal partnerships is funded with reference to the levy to be paid by the Law Society, Bar Council and certain barristers per Part 7 of the Act.

No need for funding, as there is no need for a registrar.

12. The extent to which the creation of legal partnerships would have ethical implications for members of the professions and, if so, how those implications could be addressed in the professional codes.

As per no. 5 above. The LSRA should be the ONLY authority that can sanction lawyers for anything, apart for the courts, and should be subject to judicial review, under a costs-capped system, for all its decisions. I refer to Article 34 of the constitution, which, I contend also requires that Article 37 operators, be subject to the open justice instruction of Article 34.[19] I contend that, in an information age, open justice requires that all decisions should be published online, and documentation in relation to important decisions should also be accessible online. Decision makers need to be as accountable as the persons they are holding to account. This is the nub of most accountability problems in Ireland – a lack of transparency, with tokenistic gestures to open justice.

[19] I disagree with the sometimes advanced theory that second instance hearings can remedy a lack of public hearing in first instance hearings (See: Para 32 of *DeCubber v Belguim* ECHR [1984], in this regard—'…it does not follow that the lower courts do not have to provide the required guarantees.'.); this is particularly so, when the number of appeals involves a low percentage of [1st instance] cases.